No. 15,321

IN THE

United States Court of Appeals

For the Ninth Circuit

JOHN COSTELLO, as Trustee of the Estate of William Jason Evans, Bankrupt,

Appellant,

vs.

BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION, a national banking association,

Appellee.

APPELLANT'S CLOSING BRIEF.

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APPELLANT'S CLOSING BRIEF.

Appellant has no quarrel with the Statement of Facts contained on pages 2, 3 and 4 of Appellee's Brief so far as it goes, but will supplement it in the arguments on points hereinafter referred to.

Included in the Statement of Facts on page 4 is the statement that Appellant did not seek to set aside or to avoid the assignment but rather to recover a judgment against Appellee. Appellant alleged the necessary facts in his amended complaint (Tr., p. 8) to warrant the court in finding that the assignment of

the moneys to become due under the contract with the State of California was invalid under the Civil Code Sections 3017 et seq. The prayer of the complaint for the recovery of moneys paid to Appellee pursuant to that assignment by the State of California is sufficient without specifically therein seeking to set aside or void the assignment.

The trustee's power to attack the assignment comes from Section 70e(2) of the Bankruptcy Act (11 USCA 110e(2)).[1] Pursuant to the provisions of which Section, the trustee may recover either the property or its value depending upon the circumstances of the particular case. See *Schainman v. Dean,* 24 Fed. 2d 475, in which case this court held that under Section 70e the trustee could avoid such transfers of the bankrupt's property as any creditor might have avoided and to recover the property so transferred or its value in the trustee's option, and the court permitted the trustee to recover the value of the goods transferred because of the failure to comply with California Civil Code Section 3440. This court went on

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[1]"All property of the debtor affected by any such transfer shall be and remain a part of his assets and estate, discharged and released from such transfer and shall pass to, and every such transfer or obligation shall be avoided by, the trustee for the benefit of the estate: Provided, however, That the court may on due notice order such transfer or obligation to be preserved for the benefit of the estate and in such event the trustee shall succeed to and may enforce the rights of such transferee or obligee. *The trustee shall reclaim and recover such property or collect its value from and avoid such transfer or obligation against whoever may hold or have received it, except a person as to whom the transfer or obligation specified in paragraph (1) of this subdivision e is valid under applicable Federal or State laws."* (Emphasis added.)

to hold that the fact that the money derived from the invalid sale was paid to certain creditors of the bankrupt was no defense to the action.

Virtually, the entire argument in Appellee's brief was presented to Judge Goodman and was disposed of by his opinion and order for judgment (Tr., pp. 27-42). However, we will answer the argument here, making appropriate references to the transcript.

ARGUMENT.

I. THIS COURT IS BOUND BY THE FINDINGS OF FACT MADE BY THE DISTRICT COURT.

Although it may be well settled that Appellee may urge any matter appearing in the record in support of the judgment without taking a cross-appeal, this court must accept the District Court's findings of fact unless they are clearly erroneous.

1. *First National Bank of Portland v. Dudley,* (9 Cir.) 231 Fed. 2d 396;
2. *Lines v. Falstaff Brewing Co., et al.,* (9 Cir.) 233 Fed. 2d 927, and the cases therein cited; and
3. Rule 52a of the Federal Rules of Civil Procedure, (28 USCA 52a).

II. THE PAYMENTS RECEIVED BY APPELLEE WERE RECEIVED FROM THE STATE OF CALIFORNIA UNDER THE ASSIGNMENT.

Notwithstanding the diverse and somewhat cryptic methods employed by the Appellee to obtain the pay-

ments aggregating $20,300.00, it appears clearly from the evidence (Tr., pp. 79-81) (and stipulated to by Appellee, Tr., p. 98) that all of the moneys paid by the State, after it received notice of the Assignment, to the Appellee were paid by state warrants to the order of the "Bank of America, N. T. & S. A., as Assignee of Evans Construction Co." (Finding No. 9, Tr., p. 45). That all of these warrants, except that of January 6, 1949, were deposited in the bankrupt's "Special Account" at the Bank of America (Finding No. 10, Tr., p. 45) and four of the payments to the Bank were made by checks drawn by the bankrupt to the Bank's order, and the other two were by debit vouchers made by the Bank as against this account (Finding No. 12, Tr., p. 46) (without the signature of either the bankrupt or of the co-signor hereinafter referred to) does not change the act that these moneys from the State of California were received by the Bank pursuant to the invalid assignment herein complained of.

The uncontradicted testimony of Mr. Evans before this Court was that when and as these warrants were received from the State of California by the Appellee, an officer of the Bank of America branch in question called Mr. Evans, told him to bring with him a check payable to the Bank's order for a specific amount of money to apply on the loans secured by the Assignment in question, and that it was only then when such checks were issued and delivered to the Bank's Manager that the State Warrants were credited by the Bank to Evans' special account (Tr., pp. 79-81). There

is no evidence whatever that the state warrants were endorsed by the Bank and delivered to Mr. Evans or that Mr. Evans himself deposited said Warrants to his special account.

An examination of Plaintiff's Exhibit No. 5 shows clearly that the consent of Glens Falls Indemnity Company, the prior assignee of the moneys due under this contract to Evans, to the subsequent assignment to the Appellee was *conditioned* upon all proceeds of this contract being paid into the "special account". It specified further the items which could be withdrawn therefrom and required the joint signature on checks of the bankrupt Evans and a designated representative of Glens Falls Indemnity Company. Among the items specified in Plaintiff's Exhibit No. 5 as proper items of withdrawal were expenses incidental to the performance of the State contract by Evans as well as payments on the Bank's loans. This shows clearly that under this *conditional* consent of Glens Falls Indemnity Company to the assignment to the Bank, the Bank agreed to handle these funds as Assignee under the conditions specified in Plaintiff's Exhibit No. 5. When it caused checks to be drawn to its own order by Evans to apply on its loans, the checks were countersigned by a Glens Falls Indemnity Company representative. The funds upon which these checks were drawn were clearly ear-marked and limited to the proceeds of the Assignment complained of. When the Bank used its so-called right of "setoff" for two of the items, it not only violated the terms of its trust in not obtaining the joint signatures above

referred to, but it also took the money evidenced by these two debit vouchers from the same ear-marked proceeds of this assignment. The last item of $3,785.76 was directly taken by the Bank in the form of the original State warrant without observing even the formality of the "special account" method.

We fail to understand how Appellee can claim that these moneys were received "not from the State of California, but from the bankrupt Evans". Judge Goodman in his opinion and order for judgment (at Tr., p. 37) disposed of this argument. See Findings 9, 10, 11 and 12 (Tr., pp. 45-46) and Conclusions 3[2] (Tr., p. 47).

III. THE ASSIGNMENT OF THE MONEY PAYABLE UNDER THE STATE CONTRACT IS "AN ACCOUNT" WITHIN THE MEANING OF SECTION 3017, CIVIL CODE.

The right assigned was "an account", even though payable under a written contract with the State.

The assignment (Plaintiff's Exhibit No. 4) of the right of the bankrupt to receive money due, or to become due, under a written contract with the State of California (Plaintiff's Exhibit No. 1) constituted an assignment of an "account" as the term is used in Civil Code Section 3017, was based upon a fair and reasonable construction thereof. See *Wright v. Loaiza,* 177 Cal. 605, 606, where the court stated:

> "A book account is defined as 'a detailed statement, kept in a book, in the nature of debit and credit, arising out of the contract or from fiduciary relation.' (1 C.J. 597). A necessary ele-

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[2]That notwithstanding the method of payment as set forth in Findings of Fact Nos. 11 and 12, the payments made by the State of California were received by the Bank under the assignment.

> ment is that the book shall show against whom and in whose favor the charges are made (1 C.J. 598)".

and *Schwindt v. Billiwhack Stock Farms,* 45 Cal. App. 2d 208, 210, where it was held:

> "A mutual, open and current account arises whenever through a course of dealings reciprocal demands exist which would give to each party thereto an offset against the other in an action by either party, providing that items other than cash appear as credits upon the account. *Gould v. Wood,* 205 Cal. 141, 143 (270 Pac. 183); *Furlow P. B. Co. v. Balboa L. & W. Co.,* 186 Cal. 754, 763 (200 Pac. 625); see also 1 Cal. Jur. (1921) 147, Sec. 8.)"

To show the ridiculousness of Appellee's argument, it is apparent that a sale based on a written, signed contract can result in an account. We refer to a case involving a sale by a field salesman with a written purchase order, subsequent delivery, entry on a ledger sheet, and failure to pay, being *Fresno Credit Bureau v. Batteate* (1951) 102 Cal. App. 2d 545, 546, wherein the court stated:

> "The argument advanced is that the proof was of an express contract relating to a single, isolated transaction and that the proof of such an express contract will not support findings of an open book account. This argument is without merit."

The Court said that the evidence was sufficient for judgment on an open book account or "upon an implied contract" and quotes at page 546 from *Hansen v. Burford,* 212 Cal. 100, that "the distinction, as a

matter of pleading, between a book account and an ordinary contact debt not founded on a writing, is only important . . ." on the question of statutes of limitation. See also 1 *Ruling Case Law* 207[3] cited by the court in *Mercantile Trust Co. v. Doe,* 26 Cal. App. 246 at 253.

We are here concerned with the statutory definition of an "account" as contained in Civil Code Section 3017 (1)[4] as it was in force at the time of the transaction in question.

The Legislature obviously would not undertake to act in vain. Where it uses the words italicized above, including "rights under an unperformed contract for work, goods, or services", it necessarily covers, in such reference, a written contract for "work, good or services" such as that involved between Evans and the State of California in this case. That Evans' rights

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[3]"The expression 'outstanding and open book account' has a well-defined and well understood meaning. In legal and commercial transactions it is an unsettled debt arising from items of work and labor, goods sold and delivered, and other open transactions not reduced to writing, and subject to future settlement and adjustment. It is usually disclosed by the account books of the owner of the demand and does not include express contracts or obligations which have been reduced to writing, such as *bonds, bills of exchange, or promissory notes.*" (Italics ours.)

"The finding that the amount of the balance claimed by plaintiff is due 'upon an open book account' amounts to nothing more than a finding that the Vendor of the goods kept a book account in which he made its charges against the defendant."

Preston v. Dunn, 33 Cal. App. 747.

[4]" 'Account' means an open book account, mutual account, or account stated, due or to become due, carried in the regular course of business and not represented by a judgment, note, draft, acceptance or other instrument for the payment of money; *it includes rights under an unperformed contract for work, goods or services which in the regular course will result in an open book account.*" (Italics ours.)

under this contract would result in an open book account "in the regular course" is best demonstrated by the fact that it did so result (Finding No. 8, Tr., p. 45; Conclusion No. 1, Tr., p. 47). Appellant offered and the trial court received the evidence of a Certified Public Accountant (Tr., pp. 83-91) and the Evans' accounts receivable ledger sheet itself (Plaintiff's Exhibit No. 6) primarily for the purpose of demonstrating that it was an "open book account mutual account, or account stated" in the qualified and specific sense covered by Civil Code Section 3017(1) whether or not it was such an account in the ordinary or abstract sense of those legal terms.

There is no question, that, as stated in the cases cited on page 10 of Appellee's Brief, that "a written contract can never result in an 'account' except by agreement of the parties thereto" for the purposes of the statutes of limitation. Section 3017 accepts the fact that for the purpose of the related code section certain written contracts can result in an open book account. The testimony was that the contract between Evans and the State of California would result in such an account on Evans' books.

The quotation from Ruling Case Law (page 8, supra) made by Appellee (Brief, p. 11) shows the type of "express contract or obligation" which the decisions above referred to contemplate; i.e., "bonds, bills of exchange, or promissory notes". The difference between such documents and of the contract in question between the bankrupt and the State of California (Plaintiff's Exhibit No. 1) is clear.

An examination of the decision in *In re Richards,* 108 F. Supp. 259, cited by Appellee at page 13 of its Brief, indicates its inapplicability to the case at bar. The portion of the opinion quoted by counsel for Appellee (on page 14 of their Brief) from the *Richards* case fails to underscore the fact that it was the *"Bank"* in that case which "might have kept books showing the amount due, did not so either". There, as here, the Bank was the assignee of the moneys to become due under the dealers' agreement. Here, however, the Appellant is not relying on any records kept by the Appellee Bank but is expressly relying upon the book account and records maintained at all times by the bankrupt Evans. The decision in the *Richards* case appears partly, if not primarily, predicated upon the failure of *either* the assignor or the bank to keep books showing the amount due.

It should further be pointed out that the distinction above made by Appellant with respect to the quotation from Ruling Case Law also was considered by Judge Hall in the *Richards* case (at page 262).

The difference between the "reserve account"[5] and the contract between Evans and the State of California in this case is apparent in that the reserve account in the *Richards* case could not, by any stretch of the imagination come within that part of the definition of "account" in Section 3017(1) which reads: "includes rights under an unperformed contract for work, goods or services . . ."

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[5](construed by the court in the *Richards* case as being "a mere memorandum of the debt which accrued under the terms of the written contract")

The right assigned could only arise out of a written contract.

We concede that under the Government Code Evans' cause of action against the State could only arise lawfully under the contract in question (Plaintiff's Exhibit No. 1). However, since that contract and Evans' right to the payment of money thereunder clearly come within the definition of "account" in Section 3017(1), Civil Code, as above discussed, we fail to see the materiality of that fact.

Subsequent legislation clearly shows compliance with Civil Code sections necessary at the time of this assignment.

We have read with interest the ingenious argument of the Appellee whereby it attempts to use the 1953 amendment to Section 3017 to support its contention that Appellee's compliance with the Uniform Assignment of Accounts Receivable Act was not required in this case. It may well be true that when a statute is recast "to *clarify* its meaning without *changing* the *substance* of its provisions, the legislative intent of the old statute will be determined as that intent is clarified in the new statute". The cases cited by counsel for the Appellee on pages 18, 19 and 20 of their Brief seem to so indicate. However, when the 1953 amendment, in toto, is examined, it will be seen that the 1953 amendment did far more than "clarify" the meaning of the old Section 3017 and actually and materially changed the substance of its provision.

We have quoted above, as did Appellee, certain of the provisions of Section 3017 Civil Code as it was in force in 1948, but for purposes of this comparison we will quote it in full:

1948

"Section 3017. (Definitions.) In this chapter

(1) "'*Account*' means an open book account, mutual account, or account stated, due or to become due, carried in the regular course of business and not represented by a judgment, note, draft, acceptance, or other instrument for the payment of money; it includes rights under an unperformed contract for work, goods or services which in the regular course will result in an open book account.

(2) "'*Assignment*' shall include any transfer, pledge, mortgage or sale.

(3) "'*Creditor*' means a person having any claim, whether matured or unmatured, liquidated or unliquidated, absolute, fixed or contingent.

(4) "'*Debt*' means the indebtedness owing on an account.

(5) "'*Debtor*' means any person by whom an account is owing to the assignor.

(6) "'*Filing officer*' means the county recorder of the county in which the assignor has its principal place of business within this State, or if the assignor has no place of business within this State then the county in which the assignor resides."

1953

"Section 3017. (Definitions.) In this chapter

(1) "'*Account*' means a debt, due or to become due, arising out of the sale, storage, transportation, care, repair, processing, manufacture or other improvement of tangible personal property, or arising out of a contract therefor, or arising out of the rendition of personal services which in the regular course of business will result in an open book account; provided, however, the 'account' does not include:

(a) Any debt evidenced by or arising under a judgment, note, bill of exchange, acceptance, chattel mortgage, trust receipt, lease, or contract of conditional sale (meaning a deferred payment contract reserving title in the seller).

(b) Any debt which arises from the sale of tangible personal property or from the sale or assignment of the rents, issues, profits, products, proceeds or increase of tangible personal property, if at the time of the assignment of such debt the assignee is the owner of an encumbrance or a lien upon the said personal property, which lien or encumbrance has been duly perfected against third persons pursuant to any applicable state or federal law or is so perfected within 10 days

1948

1953

after the assignment of such debt;

(c) *Any debt arising under a contract for a work of improvement to real property as defined in Section 1182 of the Code of Civil Procedure or a public work of improvement as defined in Section 4200 of the Government Code.* (Italics ours.)

(2) "'*Assignment*' shall include any transfer, pledge, mortgage or sale.

(3) "'*Creditor*' means a person having any claim, whether matured or unmatured, liquidated or unliquidated, absolute, fixed or contingent.

(4) "'Debt' means the indebtedness owing on an account.

(5) "'Debtor' means any person by whom an account is owing to the assignor.

(6) "'*Filing* officer' means the county recorder of the county in which the assignor has its chief place of business within this State, or if the assignor has no place of business within the State then the county recorder of the county in which the assignor resides.

(7) "'*Value*' means any consideration sufficient to support a simple contract, including an antecedent debt or liability where an account is taken in satisfaction thereof or as security therefor."

The exclusion [(1) (c)] which is italicized by us above indicates clearly the desire of the Legislature[6] to thenceforth exclude from the effect of the Uniform Assignment of Accounts Receivable Act the type of contract here involved. In other words, by reason of legislative action taken 5 years after the Evans-to-Bank of America assignment was made, the court is asked by the Appellee to construe the old Section 3017(1) as not requiring such exclusion. We maintain that it was only because financial institutions were able to persuade the Legislature that this type of action was permissible under the old section where Sections 3017 et seq., Civil Code, were not complied with by them, and that the requirement of such compliance was unduly arduous for such institutions, that the Legislature in 1953 granted them the exclusion, without retroactive effect. That this recasting of Section 3017 does considerably more than clarify the meaning of the former section is also, we think, demonstrated by the omission in the new Section of the words "it includes rights under an unperformed contract for work, goods and services . . ." and the substitution therefor of the specific language of Subdivision (1) (c) thereof italicized above.

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[6]incidentally at the instigation of the California Bankers' Association, its member and nonmember banks for reasons which will be more particularly hereinafter discussed

IV. THE ASSIGNMENT BEING INVALID (VOID), APPELLANT MAY RECOVER ALL SUMS PAID TO APPELLEE UNDER SAID ASSIGNMENT.

Counsel for Appellee (commencing on page 21 of their Brief) first undertake to minimize the effect of the decision in *Menick v. Carson,* 96 F. Supp. 817, by attempting to point out that the court's holding, as to the right of a Trustee in Bankruptcy to recover proceeds paid to an Assignee under an assignment invalid for non-compliance with Section 3019, Civil Code, is purely dicta. On the contrary, a fair and complete review of Judge Byrne's decision in *Menick v. Carson* can result only in the conclusion that all of the issues passed upon by him in his opinion, including the one questioned by Appellee, were necessary to the decision of the case and not merely dicta. On page 820, the court proceeds to analyze the complaint after saying,

> "With these principles in mind, we may now proceed to examine the allegations of the complaint."

Clearly, the court felt, and we think properly, that the preceding discussion, analysis and comparison of the Uniform Assignment of Accounts Receivable Statute with other California statutes designed and enacted by the Legislature for the purpose of avoiding "secret liens" was and is a necessary preamble to all of the conclusions reached by the court. In this connection, we call the court's attention to the fact that Hon. Michael J. Roche in *Costello, Trustee v. H. & B. Paint Co.,*[7] in his Findings and Judgment in favor of

[7]No. 39571, USDC, NDC.

the plaintiff trustee expressly made applicable to an identical challenge of an assignment the decision of *Menick v. Carson* as to (1) the subject of the recoverability of payments made to the Assignee prior to the institution of the action to avoid the assignment and (2) that Section 3019, Civil Code, is in pari materia with Sections 2957 and 3440, Civil Code.

There is no question that *Menick v. Carson* lays down the statutory rule that one of the purposes of Section 3019, Civil Code, "is to prevent secret liens and transfers which deceive a creditor who extends or continues credit on the basis of the debtors (assignors) financial position". Contrary to the observations of counsel for Appellee (on pages 23 through 29 of their Brief) there is ample support for Judge Byrne's view in regard to both of the points above mentioned with which Judge Roche is already in agreement. It is true that the decision of the United States Supreme Court in *Corn Exchange National Bank v. Klauder,* 318 U.S. 434 (1933), by reason of its construction of the then provisions of Section 60(a) of the Bankruptcy Act as applied in California and the other so-called "notification" states, made it advisable for financial institutions to support and procure legislative relief in the form of the adoption by California and other states of the Uniform Assignment of Accounts Receivables Acts. However, likewise contrary to the contentions of the Appellee, the Supreme Court in the *Klauder* case clearly stated that the purpose of Section 60(a) of the Bankruptcy Act is, notwithstanding the fact that Section 60 involves only recoverable preferences (within 4 months prior

to bankruptcy), a statute designed to prevent "secret liens". Mr. Justice Jackson on page 438 of the *Klauder* decision says:

> "The Committee of the House of Representatives which reported Section 60(a) as quoted above was fully aware of the vicissitudes of its predecessors. These are recited in detail elsewhere, and need not be repeated here beyond a general statement that for thirty-five years Congress has consistently reached out to strike down secret transfers and the courts have with equal consistency found its efforts faulty or insufficient to that end. Against such a background Section 60(a) was drawn and reported to Congress with this explanation of its purpose and effect: 'The new test is more comprehensive and accords with the contemplated purpose of striking down secret liens. It is provided that the transfer shall be deemed to have been made when it has become so far perfected that neither a bonafide purchaser nor creditor could thereafter have acquired rights superior to those of the transferee. As thus drafted it included a failure to record any other ground which could be asserted by a bona-fide purchaser or a creditor of the transferor, as against the transferee. A provision also has been added which makes the test effective even though the transfer may never have actually become perfected.'
>
> *Whatever advantages may inhere in non-notification financing which might have made Congress reluctant to jeopardize it, the system also has characteristics which make it impossible for us to conclude that it is to be distinguishable from the secret liens Congress was admittedly trying to reach.*" (Italics ours.)

There is nothing in the texts cited by Appellee which is or obviously could be inconsistent with the foregoing clear expression of the Supreme Court on this subject. The *M. M. Landy, Inc. v. Nicholas,* 221 Fed. 2d 923, decision cited by Appellee does not support its contention that the purpose of Section 3019 Civil Code was not to prevent secret liens of transfers. It merely affirms what we conceded; i.e., that this statute was the direct result of the 1938 (Chandler Act) amendments to Section 60(a). These later amendments merely served to exempt from the harshness of the previous Section 60(a) rule, assignments which complied with State laws similar to those which were finally enacted in California in 1943 (Section 3017 Civil Code, et seq.).

The decision in *Smith v. Harris,* 127 Cal. App. 2d 311, makes a proper distinction between Sections 3017, et seq., and Sections 2957 and 3440 of the Civil Code applicable only, however, to the facts of that case in which both the assignee and the assignor resided outside of California. The reasons given by the court in the *Smith v. Harris* case for the distinction, show clearly the inapplicability of the decision to the case at bar. Furthermore, that transfers (even as to tangible personal property) were contemplated by the Legislature at the time of its first adoption of Section 3017 Civil Code (1943) is demonstrated by the definitions then and now contained in that statute that "assignment shall include any transfer, pledge, *mortgage* or sale". (Italics ours.)

Finally, counsel for Appellee adopt (on page 29 of their Brief) a somewhat tenuous distinction, which

we term one "without a difference" between a transfer which is "void" and one which is merely "invalid."

The court in *Kirkbride v. Hickok,* 98 N.E. 2d 815, states at 820:

> "The word 'invalid' as used in a statute providing that where Testator dies leaving issue of his body or an adopted child and his Will contains devises or bequests to charitable institutions such devises or bequests are *invalid,* unless Will was executed at least one year prior to death of Testator means *void* or without validity." (Italics ours.)

By cross-reference, *Words and Phrases* Vol. 44, page 319, treats "void" and "invalid" as synonymous, and the same work cites many of the same cases in its treatment of both the words "void" and "invalid."

For an instance where "invalid", as used in a statute, means "void" and of no force and effect, see *Dreidlein v. Manger,* 220 Pac. 1107, at 1108 (Mont.).

> "The term 'invalid', when used in a statute providing that, if any foreign corporation does business without complying with domestic law all accounts and contracts made by it prior to its qualification 'shall be void and invalid', is used interchangeably with 'void' and adds no force to it, but in this instance will be construed as voidable merely, rather than absolutely void."
>
> *Mutual Ben. Life Ins. Co. v. Winne,* 49 Pac. 446, 448, 450 (Mont.).

The words "void" and "invalid" when used in regard to contracts which are immoral or against public policy, usually mean voidable at the option of one of

the parties or someone legally interested therein. *Doney v. Laughlin,* 94 N.E. 1027, at 1028.

a. Collection by defendant did not cure defect in assignment.

On the converse of the above caption, counsel for Appellee (at page 30) cite two Second Circuit cases: *Lee v. State Bank,* 38 Fed. 2d 450 (1930) and *Wallradt v. Miller,* 45 Fed. 2d 686 (1930.) Neither of these cases are in point for several reasons. They were decided three years before *Corn Exchange Bank v. Klauder* was decided and before Section 60(a) of the Bankruptcy Act was amended (1938), and therefore do not represent situations analogous to the case at bar. As appears clearly in both cases, the interpretation contended for by the Appellee, as made by the Court of Appeals for the Second Circuit, applied only to *actively* fraudulent conveyances, not constructively fraudulent conveyances (such as California Sections 2957, 3017 et seq., and 3440 Civil Code). In other words, the "secret lien" theory which Appellee ardently seeks to make inapplicable to the case at bar is actually and necessarily inapplicable to the *Lee* and *Wallradt* cases. A transfer or assignment made "with intent to hinder or delay creditors," under the decisions above cited, would merely be voidable, and presumably the collection of accounts thereunder prior to the institution of a suit to set aside such actively fraudulent assignments will cure the defect therein because they were notorious and not secret assignments. In neither of the Second Circuit decisions were there any statutory requirements constituting conditions precedent to the validity, as against creditors of

the transferor, of assignments of accounts receivable. Hence, in the absence of a recoverable preference, as to collections made prior to the invalidity of the assignments being judicially declared, collections made by the assignee were invulnerable. For a complete review of applicable legislation on the subject of assignments of accounts receivable, which supports Appellant's position that the Uniform Assignment of Accounts Receivable Act is designed to prevent "secret liens," we call the court's attention to 33 *Cal. Law Rev.* 40-111 at 60 and at 102.

See also 38 *Cal. Law Rev.* 308-313, and 3 *Collier on Bankruptcy* 900-904.

The principal distinction between the case at bar and the cases cited by Appellee (on pages 32, 33 and 34 of its Brief) is the fallacy of the assumption by Appellee that mortgages are not synonymous with assignments and their omission to consider that, as distinguished from the cases cited therein. Here, the assignment in question was, although absolute on its face, admittedly for *security purposes only.* The money which is paid by the assignor's debtor to the assignee is not, as Appellee contends, the money of the debtor but the money of the assignor. (See post.) As we pointed out in our Opening Brief, this distinction is borne out by reference to the decisions of this court *(England v. Moore Equipment Co.,* 94 F. Supp. 532 (affirmed by this court, 185 Fed. 2d 1019) cited on page 10); the Supreme Court of the State of California in *Noyes v. Bank of Italy,* 206 Cal. 266 (cited on page 10); and of the Supreme Court of the United

States in *Buffum v. Peter Barceloux Company,* 289 U.S. 227, 77 L. Ed. 1140 (cited on page 12).

b. Money collected by appellee was bankrupt's, not California's.

In its argument as to the ownership of the money received by Appellee in the above matter, Appellee urges that the Appellant may recover only the bankrupt's property under Section 70(e) of the Bankruptcy Act. The Trustee in Bankruptcy, under Section 70(a) (4), Bankruptcy Act is vested, by operation of law, with the title of the bankrupt . . . to "property transferred by him in fraud of his creditors," and (5) to property, including rights of action, which prior to the filing of the petition he could by any means have transferred . . . If, as we pointed out above, the assignment in question is invalid, void or voidable by any creditor under Civil Code Section 3019, it is recoverable by the Appellant Trustee under Section 70(e) Bankruptcy Act (11 USCA 110e).[8]

This would give the trustee no right of action against the State of California but clearly gives that right to the Appellant against the Appellee assignee and recipient of the moneys pursuant to the void assignment. *To adopt the Appellee's theory on this*

[8]"Section 70. *Title to Property.*

e.(1) A transfer made or suffered or obligation incurred by a debtor adjudged a bankrupt under this Act which, under any Federal or State law applicable thereto, is fraudulent as against or voidable for any other reason by any creditor of the debtor, having a claim provable under this Act, shall be null and void as against the trustee of such debtor."

score would be contrary to public policy generally and to the express legislative policy against "secret liens" because it would obviously result in a race between the assignee under a void or voidable assignment and the institution of bankruptcy proceedings and/or actions by trustee or creditors to void such assignments. *It would put a premium upon the diligent assignee under a voidable assignment at the expense of the creditors who, because of the noncompliance by such assignee with the provisions of Section 3019 Civil Code had no knowledge of the constructively fraudulent assignment in question.* We must read the provisions of Section 70(e) in conjunction with the provisions of Section 70(a) and when they are so read together it is clear that the laudable purposes of the Uniform Assignment of Accounts Receivable Act would be substantially defeated by the strained construction which Appellee seeks to have this court put upon the transaction in question.

CONCLUSION.

In view of the facts and law hereinabove set forth it is Appellant's contention that the District Court erred in holding that the payment of the assigned account prior to the filing of the bankrupt's petition in bankruptcy extinguished the obligation, and that Appellant had no cause of action under Section 70e of the Bankruptcy Act, and that therefore the judgment of the District Court, August 6, 1956, should be

by this court reversed, with instructions to the lower court to enter judgment for Appellant as prayed.

Dated, San Francisco, California,
May 3, 1957.

Respectfully submitted,
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